Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-324

WILLIAM STEINMAN,

Petitioner,

-against-

MAURICE H. NADJARI, as Special Deputy Attorney General, JOHN M. MURTAGH, as Justice of Extraordinary Special and Trial Term of Supreme Court, LOUIS J. LEFKOWITZ, as Attorney General of State of New York, and MALCOLM WILSON, as Governor of State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

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In the
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No.

WILLIAM STEINMAN,

Petitioner,

-against-

MAURICE H. NADJARI, as Special Deputy Attorney General, JOHN M. MURTAGH, as Justice of Extraordinary Special and Trial Term of Supreme Court, LOUIS J. LEFKOWITZ, as Attorney General of State of New York, and MALCOLM WILSON, as Governor of State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT.

Petitioner William Steinman prays that a writ of certiorari issue to review the judgment rendered December 1, 1975 by the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, declaring that VI, Section 27 of the New York State Constitution, section 149 of the Judiciary Law of New York and section 63 of the Executive Law of New York, are constitutional and not violative of the Fifth and Fourteenth Amendments of the Constitution of the United States.

On June 10, 1976, the New York Court of Appeals of the State of New York, by Memorandum Decision, dismissed

the appeal taken as of right, upon the ground that no substantial constitutional question is involved. (A15-16).

OPINIONS BELOW

The opinion by the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, is set forth in the appendix (A1-6), and is reported in 49 App. Div. 2d 456 (N.Y.).

The Memorandum Decision of the New York Court of Appeals is set forth in the Appendix (A15).

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1257(2).

THE CONSTITUTIONAL PROVISIONS AND STATE STATUTES IN ISSUE.

Constitution of the United States

Fifth Amendment

> *"No person *** shall be *** deprived of life, liberty, or property, without due process of law ***".*

Fourteenth Amendment

> "*** nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

Constitution of the State of New York

Art. 6 Section 27 (Extraordinary Term of the Supreme Court).

> The Governor may, when in his opinion the public interest requires, appoint Extraordinary

> Terms of the Supreme Court. He shall designate the time and place of holding the term and the Justice who shall hold the term. The Governor may terminate the assignment of the Justice and may name another Justice in his place to hold the term."

Statutes of New York

Section 149. Judiciary Law.

> *"Section 149. Governor may appoint extraordinary terms and name justices to hold them.*
>
> 1. The governor may, when in his opinion the public interest requires, appoint one or more extraordinary special or trial terms of the supreme court. He must designate the time and place of holding the same, and name the justice who shall hold or preside at such term, and he must give notice of the appointment in such manner as, in his judgment, the public interest requires. The governor may terminate the assignment of the justice named by him to hold a term appointed pursuant to this section, and may name another justice in his place to hold the same term. ***"
>
> 2. A motion involving a matter pending before such extraordinary special or trial term shall be made returnable at such term, except that, in the exercise of discretion, a justice of the appellate division of the supreme court in the department in which such extraordinary special or trial term is being held may grant permission for such motion to be heard at a term of such appellate division."

Section 63 of the Executive Law

> "*Section 63. General Duties.* The Attorney General shall:
>
> "1. ***"
>
> "2. Whenever required by the governor, attend in person, or by one of his deputies, any term of the

supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement ***."

QUESTIONS PRESENTED

Where a state statute authorizes and empowers the governor to create an extraordinary term of the Supreme Court, and to appoint the justice thereof, and further empowers the governor to terminate the appointment of the justice at will, is such a statute unconstitutional and void as violative of the independence of the judiciary and of the separation of powers guaranteed against encroachment by the Due Process Clause of the 14th Amendment?

Where a state statute authorizes and directs the independently-elected attorney general, in person or by one of his deputies, to manage and conduct all proceedings in an extraordinary term of the supreme court created by the governor, which extraordinary term is presided over by a justice appointed and removable at will by the governor, and the governor likewise designates his own special prosecutor in place and in stead of the Attorney General, or one of his deputies, to conduct all proceedings in such extraordinary term of the supreme court, would such a statute, as so applied, be constitutionally abhorrent to the Petitioner's right to a fair trial in a fair tribunal?

STATEMENT OF THE CASE

Petitioner was indicted by an extraordinary special and trial term grand jury on December 19, 1974, charged with the crimes of conspiracy third degree, attempted bribery second degree, and grand larceny second degree, in violation of the penal statutes of New York.

On October 13, 1972, the extraordinary special and trial term had been appointed by the governor of the State of New York, reported in 9 NYCRR 1.61-65, under the authority of *Art. 6, section 27 New York State Constitution* and *Section 149 subd. 2 Judiciary Law of New York.*

Under the constitutional provision and statute aforesaid, it is expressly provided that:

> The Governor may, when in his opinion the public interest requires, appoint Extraordinary Terms of the Supreme Court. He shall designate the time and place of holding the term and the Justice who shall hold the term. The Governor may terminate the assignment of the Justice and may name another Justice in his place to hold the term."

Section 63 Executive Law, implementive of *Section 149 Judiciary Law* aforestated, provides in pertinent part, as follows:

> "*Section 63. General duties.* The Attorney General shall:
>
> 1. Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interests of the state ***.
>
> 2. Whenever required by the governor, *attend in person, or by one of his deputies,* any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement ***." (underscoring ours)

In implementation of *Section 149 Judiciary Law* and *Section 63 Executive Law*, the then former Gov. Rockefeller, as predecessor Governor of the State of New

York, issued Executive Order No. 58, dated September 19, 1972, directed to the respondent attorney general, reported in 9 NYCRR 1.55-59, reading in pertinent part as follows:

> "I. Pursuant to article IV section three of the Constitution of the State of New York, the provisions of subdivision two of section 63 of the Executive Law and the statutes and law in such case made and provided, and in view of the recommendation of the Commission to Investigate Allegations of Police Corruption in the City of New York, *I hereby require that you, the Attorney General of this State, attend in person, or by one or more of your assistants or deputies,* an Extraordinary Special and Trial Term of the Supreme Court to be appointed by me to be held in and for the county of Kings, at the County Court House and any other term or terms of the Supreme Court in and for the County of Kings, and that you, in person or by said assistants or deputies, appear before the grand jury drawn for said extraordinary term of said court, and before any grand jury or grand juries which shall be drawn or which shall have heretofore been drawn for any other term or terms of said court, for the purpose of managing and conducting in said court and before said grand jury and said other grand juries any and all proceedings, examinations and inquiries and any and all criminal actions and proceedings which may be had or taken by or before said grand jury and grand juries concerning or relating to:
>
> (a) any and all corrupt acts and omissions by a public servant or former public servant occurring heretofore or hereafter in the County of Kings in violation of any provision of State or local law and arising out of, relating to or in any way connected with the enforcement of law or administration of criminal justice in the City of New York;
>
> (b) ***
>
> (c) *** (underscoring ours)

Simultaneously therewith, the Governor specifically directed the Attorney General to designate and appoint the Respondent Nadjari as a Special Deputy Attorney General for the purpose of managing and conducting all criminal proceedings in the Extraordinary Term of the Supreme Court as aforestated.

Subsequent to Petitioner's indictment as aforestated, he commenced an action for a Declaratory Judgment, pursuant to New York Civil Practice and Procedure Law Sec. 3001, to declare:

> (a) that *Article 6, Section 27 New York State Constitution,* and *Section 149 Judiciary Law* are unconstitutional and null and void, as inherently violative of the fundamental Separation of Powers secured against encroachment under the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States, and Article 1, Section 6 of the New York State Constitution, in that the absolute power vested in the Governor by the statute aforesaid, to terminate the assignment of the justice named by him, at will, and to name another justice in his place to hold the same term, is wholly destructive of the independence, autonomy and separateness of the judiciary.
>
> (b) That *Section 63 Executive Law,* as applied, is unconstitutional and void, as violative of the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States, and Art. 1, Sec. 6 Constitution of the State of New York.
>
> (c) That the Extraordinary Special and Trial Term, convened under the unconstitutional

statutes aforesaid, and the indictment against the Petitioner procured under color thereof, are null and void, as violative of the Due Process Clause of the federal and state constitutions.

The Petitioner's action for a Declaratory Judgment alleged in substance as follows:

That in the execution, enforcement and operation of the statutes aforesaid, and under color thereof, the Respondent Nadjari, his agents and deputies, and other law enforcement agencies acting in concert with him, engaged generally in a systematic course of prosecutorial misconduct against this Petitioner, as well as numerous others similarly situated, shocking to the conscience, offensive to the canons of decency and a fundamental sense of justice, resulting in irreparable injury to this Petitioner and to numerous others similarly situated, and further resulting in irreparable injury to the fair and just administration of criminal justice, the rule of law, the integrity of the judicial process and the purity of the courts.

That the Respondent Nadjari, his agents and deputies, acting in concert with various members of the New York City Police Department, and with various members of the federal strike force attached to the United States Attorney for the Southern District of New York, under color of the statutes aforesaid grossly violated and abused his oath and authority as Special Deputy Attorney General in the management and conduct of all criminal proceedings against the Petitioner, in manner as follows:

(a) The Respondent Nadjari wilfully, wrongfully and unlawfully entrapped the Petitioner into the commission of alleged crimes charged against him in the indictment aforestated, and did so through the instrumentality of a known professional briber and entrapper of ill repute and character.

(b) The said respondent wilfully, wrongfully and unlawfully deprived the Petitiner of the right to a prompt arraignment in a court of law, without unnecessary delay, immediately following his arrest on September 25, 1973, thus denying to Petitioner at a critical stage of the proceedings against him, the due protection of a court, the right to counsel, the right to a preliminary examination, and the right of confrontation of the witnesses against him, all in flagrant violation of due process of law.

(c) The Respondent Nadjari wilfully, wrongfully and unlawfully held the Petitioner incommunicado for a period of approximately three months, from the date of his arrest until the date of his indictment, December 19, 1973, under threat and fear, in a continuing and sustained attempt to coerce and intimidate him to "cooperate" with the Respondent Nadjari, on penalty that if he did not do so, he would promptly fingerprint, book and arraign the Petitioner in a criminal court in connection with his arrest as aforestated.

(d) That during the interval of the three month period aforestated, the Respondent Nadjari, through his agents and deputies and those acting in concert with him, wilfully, wrongfully and unlawfully attempted to coerce and intimidate the Petitioner, by threat and fear, to entrap and ensnare various public servants within the criminal justice system of Kings County, particularly "any" Supreme Court Justice, and "any" secretary to a Supreme Court Justice, into the commission of various acts of bribery, larceny and related crimes.

(e) The Respondent Nadjari, through his agents and deputies, did wilfully, wrongfully and unlawfully attempt to coerce, harass and terrorize witnesses and potential witnesses appearing before the Grand Jury managed and

conducted by him, as aforesaid, into giving false and untrue testimony regarding the Petitioner's alleged criminal pre-disposition.

(f) In pursuit of the unlawful objectives aforestated, the said Respondent, his agents, deputies and others acting in concert with him, wilfully, wrongfully and unlawfully, without any sanction or authority in law whatsoever, contrived and systematically employed the device of a mock arrest and conviction of a federal undercover agent posing as a criminal Defendant, and in pursuance thereof, did suborn perjury of various witnesses into testifying perjuriously in the criminal courts of the State of New York, and before the Grand Jury, and did further wrongfully and wilfully deceive and defraud the Supreme Court of the State of New York, County of Kings, and the ancillary services thereof, with respect to the staged and fictitious plea and sentencing proceedings thereunder.

(g) The Respondent Nadjari, his agents and deputies, in concert with other law enforcement agents aforestated, did falsely and fraudulently represent to the United States Court of Appeals in a criminal proceeding entitled *United States v. Archer*, 486 F.2d 670, (1973), and again to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, that the said manufactured device of a mock arrest and conviction of a Federal undercover "defendant" had been expressly authorized, sanctioned and approved by Chief Judge Fuld of the Court of Appeals of the State of New York, whereas in truth and in fact, the said Chief Judge had never sanctioned or approved such practice, but rather, had in fact explicitly declined to approve the same; and had in fact so specifically informed the Respondent, Nadjari, through his agents and deputies, long prior to the date of the entrapment and arrest of this Petitioner as aforestated.

(h) The Respondent Nadjari, his agents and deputies, acting in concert with law enforcement officers as aforestated, and in wilful defiance of the Court's plain admonition in *United States v. Archer, supra*, against the continued practice of "Government-induced criminality", did nevertheless, wilfully and wrongfully continue to employ such practices against petitioner, up to and including the date of the indictment, December 18, 1973.

(i) The Respondent Nadjari, did wrongfully and wilfully contrive to deprive Petitioner of his right to a fair and impartial trial, particularly as to his right to assert the affirmative defense of entrapment, by prejudicially asserting and disseminating in a widely-reported news conference pre-arranged by him together with the United States Attorney for the Southern District of New York, on December 19, 1973, publicly proclaiming that Petitioner had a criminal predisposition, whereas in truth and in fact, he had no criminal pre-disposition of any kind, and had never been involved in any act relating to bribery, larceny or any criminal act whatsoever.

(j) That by reason of the facts aforestated, the Respondent Nadjari, his agents and deputies, and all those acting in concert with him in the management and conduct of the criminal proceedings against this Petitioner, so abused their powers under color of the unconstitutional statutes aforesaid as to wilfully involve themselves in the commission of various criminal acts, both federal and state, as follows: Deprivation of rights under color of law (18 USC 242); Conspiracy against rights of citizens (18 USC 241); Coercion in the First Degree (Penal Law section 135.60); Perjury in the First Degree (Penal Law Section 210.15); Perjury in the Second Degree (Penal Law Section 210.10); Criminal Solicitation in the Second Degree (Penal Law Section 100.05); Criminal Impersonation (Penal Law

Section 190.25); Obstructing governmental administration (Penal Law Section 195.05); Conspiracy (Penal Law Section 105.05 and 105.30); Official Misconduct (Penal Law Section 195.00); Bribery (Penal Law Section 200.00); Attempted Eavesdropping (Penal Law Section 250.05), among others.

The Petitioner's complaint in the declaratory judgment action further alleged that by reason of the premises aforestated, the Plaintiff has been irreparably injured in his constitutional right to a just, fair and impartial trial by an independent judiciary; and that by reason of the premises aforestated, the integrity of the judicial process and the administration of criminal justice have been irreparably injured and violated.

On November 25, 1974, on motion of the Respondent Nadjari, the action for Declaratory Judgment was dismissed by the Supreme Court of the State of New York, County of Kings (McGrover, J.). The opinion is set forth in the Appendix, (A7-12). The Court held that the constitutionality of the statutes in question "may be raised in the criminal proceeding now pending against the Plaintiff in which an indictment had been returned against him prior to the commencement of the present action" (A10).

On December 1, 1975, the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, modified the decision of the lower court, and held that *Art. 6 Sec. 27 New York State Constitution, Section 149 Judiciary Law* and *Section 63 Executive Law* are constitutional. (A1-6).

On June 10, 1976, on Petitioner's appeal taken as right therefrom, to the New York Court of Appeals on constitutional grounds pursuant to Civil Practice Law and

Rules 5601(a), the Court dismissed the appeal upon the ground that "no substantial constitutional question is directly involved ***" (A15).

Subsequent thereto, the Petitioner pleaded guilty to one count of the indictment, Grand Larceny Second Degree and on March 19, 1976 was sentenced to pay a fine of $2000. A Certificate of Relief from Disabilities was issued to Petitioner on April 19, 1976, pursuant to Article 23 N.Y. Correction Law.

REASONS FOR ALLOWANCE OF WRIT

The state court has decided a federal question of great substance not theretofore determined by this Court, and has decided it in a way not in accord with applicable decisions of this Court.

A.

In the absolute power vested in the Governor to appoint and to remove at will, any judge designated by him to hold the extraordinary special and trial term of the supreme court, both *Article 6, Section 27 of the New York State Constitution* and *Section 149 of the Judiciary Law* are unconstitutional and void, on their very face, as inherently violative of the independence of the judiciary, and the Separation of Powers guaranteed against encroachment by the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States and Article 1, Section 6 of the New York State Constitution.

The fatal flaw of the statute and constitutional provision in issue is that in its in-built potential of control by the Governor over any judge appointed by him, it is inherently violative of the independence of the judiciary.

The cardinal principle laid down by this Court, of long vintage, is that the constitutionality of a measure depends not on the degree of its exercise but on its principle. (*Providence Bank v. Billings*, 29 U.S. 514, 7 L Ed. 939).

In *Stuart v. Palmer*, 74 N.Y. 183, 189, the New York Court of Appeals long ago followed the same seminal test of constitutionality:

> "The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done."

Accord: *Rosalsky v. State*, 254 NY 117.

The principle enunciated in *Stuart v. Palmer, supra*, has been quoted with approval by this Court in *Montana Co. St. Louis Mining & Co.*, 152 US 160, 169 (1894); also, *Farmer Grain Co. v. Langer*, 273 F.Rep. 635, 647 (1921).

In *People v. Klinck Packing Co.*, 214 N.Y. 121, 138-139 (1915), the Court reiterated the applicable rule:

> ". . . we are to judge of a statute by what is possible under it. In the absence of any guide it might very well happen that an administrative officer with the best of purposes would nevertheless be very fallible in the execution of them."

Directly pertinent is this Court's decision in *Dreyer v. Illinois*, 187 U.S. 71, where Mr. Justice Harlan stated at page 84:

> " 'When we speak,' said Story, 'of a separation of the three great departments of government, and maintain that that separation is indispensible to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. *The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution.* Story's Const. (5th ed.) 393 . . ." (Emphasis supplied.)

Here, where the "whole power" has been unconstitutionally vested in the hands of the executive over the judiciary of the Extraordinary Term of the state supreme court, the statute is intrinsically violative of the separation of powers.

The doctrine of Separation of Powers in our constitutional system of government by checks and balances is a "bulwark against tyranny" (*United States v. Brown*, 381 U.S. 437 (1965).

> Accord: (*O'Donohue v. U.S.*, 289 US 516; *Kilborne v. Thompson*, 103 U.S. 168, 190; *Springfield v. Philippine Islands*, 177 U.S. 189, 201; *Federalist Papers* No. 47, 48, 51.)

The gravely pernicious potentials of the statute in issue are readily apparent.

The independence of the judiciary is automatically subjugated to the control, whim and caprice of the executive. The power to hire and fire a judge puts the executive implacably "in control of judicial action" (*People ex rel S.L. & T. Co. v. Extraordinary Term*, 220 NY 487; *Dreyer v. Illinois, supra*.

A judge so compromised would be inevitably impelled to tilt the balanced scales of justice against any accused—if only to curry the favor of the Governor on the one hand, or avert the embarrassing retribution of removal, on the other. In a court of justice so heavily stacked against the accused, with the Governor holding the strings of both the

judge and prosecutor, the elemental rights to a fair trial are hopelessly compromised. No judge so situated could reasonably maintain the balance true, despite the best of intentions and the highest nobility of motive.

In no other instance under New York's Judiciary Law, is the absolute power and authority to appoint terms of court, and assign judges thereto, vested in other than the judicial authority of the various appellate divisions of the state supreme court (*Judiciary Law Sec. 86*). And certainly, in no other instance, is the autocratic power to terminate a judicial appointment even during the same term, vested in the governor, or anyone else outside the judicial system.

In re Murchison, 349 U.S. 133 (1965), the Court stated:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. *But our system of law has always endeavored to prevent even the probability of unfairness.* To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. *Circumstances and relationships must be considered. This Court has said, however, that every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio*, 273 U.S. 510, 532, 71 L. ed. 749, 758, 47 S. Ct. 437, 50 ALR 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 99 L. ed. 11, 75 S. Ct. 11." (emphasis ours.)

In *United States v. Walker*, 473 F 2d 136 (CA, DC. 1972), the Court noted:

> "The disciplined judicial mind should not be subjected to any unnecessary strain; even the most austere intellect has a subconscious."

Even far beyond their evil potential, an inordinate number of judgments of conviction, reversed on appeal by the appellate courts, reflect the intolerable degree to which these unconstitutional statutes have inadvertently tended to deprive criminal defendants at the bar of the extraordinary term of a fair trial in an impartial tribunal.

Thus, in *People v. Bell*, 45 App. Div. 2d 362 (1st Dept. 1974, aff. 38 NY 2d 116, reversing a conviction of a police officer for attempted possession of a dangerous drug, burglary first degree and attempted grand larceny, with concomitant sentence of six to eighteen years in prison, the Appellate Division held:

> "On this record, it is clear that the totality of the trial court's errors was prejudicial and, in effect, denied defendant-appellant Richard Bell a fair trial. . . .
>
> Read as a whole, the charge was prejudicial in that it appeared to emphasize the strength of the prosecution's case, in derogation of the requirement to give balanced instructions to the jury in a criminal trial. . . ."

Of the same tenor, see also *People v. Levy*, 47 AD2d 12 [2d Dept. Feb. 24, 1975] *People v. Johnson*, 46 AD 2d 123 (1st Dept. 1974), 361 NYS 2d 921, 926; *People v. Harding*, 44 AD 2d 800 (1st Dept.); *People v. Mackell*, 47 Ad 2d 209 (2nd Dept. 1975); *Matter of Nigrone*, 46 AD 2d 343 (2d Dept. 1974). All involved Respondent Judge Murtagh as the presiding judge of the Extraordinary Term of the

Supreme Court.*

It matters not that the unfettered power thus vested in the governor springs from the highest ideals and purest motivations of rooting out a festering corruption in the criminal justice system. Good intentions can never redeem the evil potentials of the statute.

In *NAACP v. Alabama*, 377 US 288, 307, this Court stated:

> "(E)ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

In sum, this Petitioner, as all others similarly situated before the extraordinary term, have been deprived of the substantive right to be tried by a judge randomly chosen. Instead, he was slated to stand trial before the Governor's personally hand-picked judge and hand-picked Special Prosecutor, both of whom were summarily removable at the instance, will, whim or caprice of the Executive.

Every litigant at the bar of criminal justice before the extraordinary special and trial term of the supreme court is thus effectively deprived of the equal protection of the laws accorded all other criminal defendants in regularly constituted terms of the Supreme Court.

That this question is so substantial as to require plenary consideration by the Supreme Court of the United States for its resolution is readily attested by the fact that the state statute in issue is an identical replica of the tyrannical power exercised by King George III over the colonial

*Judge Murtagh died on January 13, 1976, and was succeeded by the Hon. Justice Leonard H. Sandler as presiding judge by designation of the Governor pursuant to Section 149 Judiciary Law.

governments, through his royal governors, by systematically appointing and controlling his own judges and prosecutors. "He has made Judges dependent on his Will alone, for the tenure of their offices, ***" (*Declaration of Independence, July 4, 1776*).

A provision in a state constitution is subject to the due process clause of the federal constitution. A State Constitution, no less than a statute, can be attacked for unconstitutionality. (*American Federation of Labor v. Watson*, 327 US 582, 592-3; *Driskell v. Edwards*, 518 F.2d 890 (CA 5, 1975); *Baker v. Carr*, 369 US 186; *WMCA v. Lomenzo*, 377 US 633; *Dreyer v. Illinois*, 187 US 71; *Railway Express Agency v. Virginia*, 282 US 440; *Adamson v. Calif.*, 332 US 46; *Torcaso v. Watkins*, 367 US 488; *Williams v. Bruffy*, 96 US 176, 183; *King Mfg. Co. v. Augusta*, 277 US 100, 104-5; *Guaranty Trust Co. v. Blodgett*, 287 US 509, 513; *Kingsley Picture Corp. v. Regents*, 360 US 684, 688).

B.

By designating his own special prosecutor to manage and conduct all proceedings in the court so controlled by the executive as aforesaid the Governor has not only magnified manifold the potential dangers of *Section 149 of the Judiciary Law* to the independence of the judiciary and to the due process rights of an accused, but has likewise rendered *Section 63 of the Executive Law* and *Executive Order No. 58* issued thereunder, unconstitutional and void, *as applied*, under the Due Process Clause of the Constitution.

This Court has held that "(w)e have not hesitated on direct review to strike down applications of constitutional statutes which we have found to be unconstitutionally

applied." (*Cameron v. Johnson*, 390 US 611; *Cox v. Louisiana*, 379 US 559; *Steffel v. Thompson*, 415 U.S. 452; *Allee v. Medrano*, 416 US 802, 815).

Rarely in all prosecutorial experience in this country has "the ignoble shortcut to conviction" (*Mapp v. Ohio*, 367 US 643, 660) descended to the levels enumerated here, enveloping the very integrity of the judicial process and the administration of criminal justice.

Seldom in all the annals of criminal jurisprudence has a prosecutor so flagrantly abused the lawful limits of power and authority as in the case at bar.

The unprecedented imperial power vested in the governor by *Section 149 of the Judiciary Law* has inevitably tended to invite, encourage and generate the very tyrannical abuses practiced by the respondent Nadjari at bar, not only against this Petitioner, but against all others similarly situated, as reflected in a proliferating number of reported cases.

It is no mere coincidence that of all those indicted by the Respondent Nadjari under color of these statutes and the Governor's Executive Order issued thereunder, an abnormal number of those charged have interposed defenses alleging willful entrapment, failure to arraign defendants in a criminal court, gross prosecutorial misconduct violative of due process, gross abuse of jurisdiction, outrageous and unfair trial tactics, and "perversion of the criminal justice system of an overzealous prosecutor" (*See Matter of Nigrone*, 46 AD 2d 343) (2d Dept., 1975); *People v. Bell*, 45 App. Div. 2d 362 (1st Dept. 1974), aff. 38 N.Y. 2d 116; *People v. Harding*, 44 App. Div. 2d 800 (1st Dept. 1974); *People v. Rao*, 46 App.Div.2d 343 (2d Dept. 1975); *United States v. Archer*, 486 F.2d 670 (CA 2); *Matter of Klein v. Murtagh*, 44 App.Div.2d 465 (2d Dept., aff. 34 NY 2d 988); *People v. Steinman*, 44 App.Div.2d 839 (2d Dept., 1974); *People v. Levy*, 47 App Div. 2d 12 (2d Dept., 1975); *Matter of Moritt v. Nadjari*, 46 App.Div. 2d 784 (2d Dept.).

On December 24, 1975, the respondent Nadjari was summarily dismissed by the successor governor, with the concurrence of the respondent Attorney General, effective June 29, 1976, because of a "perceptible decline in public confidence" (*New York Times*, Dec. 24, 1975, p. 1).

On June 12, 1976, the *New York Times* editorially urged that Mr. Nadjari's term be ended on the scheduled effective date because of "the continuing doubts concerning Mr. Nadjari's ability, his methods, his attitude toward civil liberties and his tenure, which have grown to such proportions as to be obstacles to the accomplishment of his task."*

C.

As is plainly manifest, each of the constitutional issues presented in this appeal are substantial (*Zucht v. King*, 260 US 174, 177; *Rule 15(e) Rules of the Supreme Court*.

In dismissing the appeal taken as of right under New York law pursuant to Civil Practice Law and Rules 5601(b), on the ground that "no substantial constitutional question is directly involved" we respectfully submit that the New York Court of Appeals seriously erred in failing to strike down these statutes as fundamentally violative of the separation of powers guaranteed against encroachment by the federal constitution under the Due Process Clause of the 5th and 14th Amendments.

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*The Respondent Nadjari has been succeeded by the Hon. John F. Keenan as Special Prosecutor for the Extraordinary Term, by designation of the successor Governor Hugh L. Carey effective the same date.

Further, the New York Court of Appeals failed to adhere to its standard precedents laid down in its own prior decisions in *People ex rel S.L. & T. Co. v. Extraordinary Term of the Supreme Court, supra,* Cardozo, J. and in *Matter of Reynolds v. Cropsey,* 241 N.Y. 389 (1925), construing the very statute here in issue in its preamended form.

With all due deference and the utmost respect, a state court cannot so construe a state statute as to render it obnoxious to the federal Constitution. (*Arizona Employer Liability Cases,* 250 US 400; *Crew Levick Co. v. Comm. of Pa.,* 245 US 292). The Supreme Court of the United States is not bound by the determination of the New York Court of Appeals that the constitutional questions are not substantial, but must reach a conclusion independent of the state court. (*Appleby v. City of New York,* 271 U.S. 364; *Napue v. Illinois,* 360 US 264; *Brookhart v. Janis,* 86 S.Ct. 1245; *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697).

With all due deference and respect, the state Appellate Division of the Supreme Court below seriously erred in holding that the Petitioner's contention as to the unconstitutionality of Sec. 149 Judiciary Law was "answered" in *People v. Davis,* 67 Misc. 2d 14, 16, 322 NYS 2d 927, 930 (A4). The *Davis* case involved only the constitutional power of the governor to appoint a Judge for the Extraordinary Term, but did not deal with the fundamental issue as to the governor's constitutional right to *terminate* the judge's appointment, at will and at any time.

The right to appoint a judge for the Extraordinary Term had been long ago upheld by the New York Court of Appeals in *People ex rel. Saranac Land & Timber Co. v. Extraordinary Special and Trial Term of the Supreme Court,* 220 NY 487 (1917), per Cardozo, J., and *Matter of Reynolds v. Cropsey,* 241 NY 389 (1925).

There, Judge Cardozo explicitly declared that the principle of separation of powers was not violated because "the proclamation makes no attempt to control the action of the court *** The power of the judge who sits in judgment is not affected by executive rescript or decree. It is governed only by the law."

The fact is that the *Davis* case, cited below, merely construed the statute as it existed *in its original preamended form,* relating solely to the governor's power to appoint. The statute, as it then read, did not contain the constitutionally offensive provision here in issue, empowering the governor to terminate summarily the assignment of the judge at any time, added to the statute by the laws of New York, L. 1939, ch. 1.

In sustaining the constitutionality of the statute, the Appellate Division below unduly equated the governor's special power to pardon—which, its opinion states, "erases the stigma of conviction branded upon a criminal defendant in a court of law" (A5)—with the governor's unlimited power to hire and fire a judge of the Extraordinary Term at will.

With all due deference, there is no analogy between the governor's limited pardoning power to ameliorate a conviction, as compared to the "whole power" exercised by the governor in controlling judicial action under the unconstitutionally abhorrent statute at bar. (*Dreyer v. Illinois,* 187 US 71, 84). Moreover, a pardon does not "erase" criminal conviction. It is, rather, an implied expression of guilt, the conviction is not obliterated, and the stigma of conviction remains. (*Burdick v. United States,* 236 US 79; *Jablon v. Board of Regents,* 271 App.Div. 369 (NY); *Baldi v. Gilchrist,* 204 App. Div. 425 (NY). Thus, the encroachment by the executive over the judiciary is the exercise of the pardoning is relatively minimal.

The constitutional issue raised in the within Petition had been previously propounded to this Court in *Matter of Moritt v. Extraordinary Special and Trial Term*, 46 App. Div. 2d 1012 (2d Dept. NY 1974), app. dismissed 36 NY 2d 911 (1975) re-argument denied September 10, 1975, leave to appeal denied September 10, 1975. There, the constitutional question at bar had been presented as one of several combined jurisdictional issues in an omnibus proceeding brought pursuant to *New York Civil Practice Law and Procedure Article 78*.

In dismissing the appeal, the New York Court of Appeals stated in a memorandum decision as follows:

> "Motion to dismiss the appeal granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved (CPLR 5601(b)(1).
>
> Cross-motion for a stay of proceedings dismissed as academic. We do not reach the obvious question as to whether prohibition lies under CPLR article 78 (*Matter of Nigrone v. Murtagh and Nadjari*, 36 NY 2d ____; *Matter of State of New York v. King*, 36 NY 2d 59)."

A direct appeal taken to this Court pursuant to 28 USC 1257(2) was dismissed on December 15, 1975 for want of jurisdiction, (Docket 75-648, 18 CrL 4108), and not for lack of a substantial federal constitutional question, as urged by the respondent Nadjari. Presumably, the non-federal ground raised in the memorandum decision by the New York Court of Appeals hereinabove set forth precluded review (*Supreme Court Practice, Stern-Gressman, p. 89*). Thus, the constitutional issue remains viable before this Court.

D.

The Petitioner's plea of guilty and sentence thereunder did not moot the constitutional issues raised in the action for a Declaratory Judgment in the state court. A constitutional claim will survive a guilty plea. *Menna v. New York*, 423 US 61, 46 L.ed 2d 195.

Nor will the Petitioner's constitutional contentions be mooted, because of the prejudicial collateral consequences flowing from the criminal conviction. (*St. Pierce v. United States*, 319 US 41, 43; *Fiswick v. United States*, 329 US 211, 220-3; *United States v. Morgan*, 346 US 502, 512-3; *Pollard v. United States*, 352 US 354, 358).

Finally, we respectfully urge upon the Court that the substantial constitutional issues do remain viable because they involve questions of the highest public importance, likely to recur. (*Dunn v. Blumstein*, 405 US 330; *Roe v. Wade*, 410 US 113; *Matter of Beattie v. New York State Board of Parole*, 39 NY 2d 445; *People ex re. Guggenheim v. Mucci*, 32 NY 2d 307. Thus, in *Roe v. Wade, supra*, the Court allowed a woman to challenge a state anti-abortion law although this challenge occurred after her own pregnancy had been terminated. In *Dunn v. Blumstein, supra*, the Court permitted a constitutional challenge to a state voting statute, under the equal protection clause, even though the plaintiff had become eligible to vote by the time the District Court reached his challenge to residency requirements.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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APPENDIX A
OPINION OF THE APPELLATE DIVISION DECEMBER 1, 1975

SUPREME COURT : APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

HOPKINS, Acting P.J., MARTUSCELLO, COHALAN, CHRIST and MUNDER, JJ.

WILLIAM STEINMAN,
Appellant,

-against-

MAURICE H. NADJARI, etc., et al.,
Respondents.

APPEAL by plaintiff from an order of the Supreme Court at Special Term (ALBERT S. McGROVER, J.), dated December 23, 1974 and entered in Kings County, which granted defendants' motions to dismiss the complaint and denied his cross motion for summary judgment.

Hervey & Legum, Brooklyn, N.Y. (Aaron Nussbaum of counsel), for appellant.
Maurice H. Nadjari, Deputy Attorney-General, New York, N.Y. (Allen G. Swan and Bennett L. Gershman of counsel), respondent *pro se.*
Louis J. Lefkowitz, Attorney-General, New York, N.Y. (Burton Herman and Samuel A. Hirshowitz of counsel), respondent *pro se,* and for John M. Murtagh and Malcolm Wilson, respondents.

COHALAN, J. The plaintiff was indicted in 1973 by the Extraordinary and Special Grand Jury of Kings County for the crimes of conspiracy in the third degree, attempted bribery in the second degree and grand larceny in the second degree. He has previously unsuccessfully attacked the indictment in both State and Federal courts of original and appellate jurisdiction on the grounds of alleged (1) prosecutorial misconduct of the special prosecutor, (2) bias on the part of the Justice presiding at the Extraordinary Special and Trial Term and (3) violation of the plaintiff's civil rights.

The plaintiff's present thrust is a claim of unconstitutionality of not only two statutes (Judiciary Law, §149; Executive Law, §63 [subd. 2]) but also of a provision of the State Constitution (art. VI, §27), which he claims is violative of the Fifth and Fourteenth Amendments of the Federal Constitution.

The plaintiff is aware that all the arguments he has advanced are available to him in the trial court upon the trial of the indictment and it is upon this theory of an adequate remedy at law that the Special Term dismissed the complaint. He contends, however, that it is futile to expect to obtain relief from the very Justice before whom he is to be tried. We do not agree, but, under the particular circumstances of this case, including the nature of the constitutional claim raised and the absence of disputed facts, a decision upon the merits is appropriate.

As pertinent to his challenge, we quote the cited items (the underlined portions are the direct subjects of his attack). Section 27 of article VI of the New York State Constitution reads:

"Section 27. [*Extraordinary Term of the Supreme Court*]

The governor may, when in his opinion the public interest requires, appoint extraordinary terms of the supreme court. He shall designate the time and place of holding the term and the justice who shall hold the term. *The governor may terminate the assignment of the justice and may name another justice in his place to hold the term.*"

Section 149 of the Judiciary Law provides:

"*Section 149. Governor may appoint extraordinary terms and name justices to hold them.*

"1. The governor may, when, in his opinion the public interest requires, appoint one or more extraordinary special or trial terms of the supreme court. He must designate the time and place of holding the same, and name the justice who shall hold or preside at such term, and he must give notice of the appointment in such manner as, in his judgment, the public interest requires. *The governor may terminate the assignment of the justice named by him to hold a term appointed pursuant to this section, and may name another justice in his place to hold the same term.* ***

"2. A motion involving a matter pending before such extraordinary special or trial term shall be made returnable at such term, except that, in the exercise of discretion, a justice of the appellate division of the supreme court in the department in which such extraordinary special or trial term is being held may grant permission for such motion to be heard at a term of such appellate division."

Section 63 of the Executive Law provides, in pertinent part:

"Section 63. *General Duties*

"The attorney general shall:

* * *

"2. *Whenever required by the governor, attend in person, or by one of his deputies, any term of the*

> *supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement * * * .*"

The plaintiff objects to the power of termination reposed in the Governor, not the power initially to appoint. His argument reduces itself to the postulate that the power to "terminate the assignment of the justice named by him" and to name another in his place denigrates the independence of the judiciary and thus is abhorrent to the constitutional theory of separation of powers.

The obvious situations that would impel a termination are a protracted illness of the Justice presiding or his unwillingness to continue in the role. Presumably, in either event, the Governor would relieve him of his assignment. The suggestion made by the plaintiff, however, goes far beyond those examples. He asserts that irrespective of whether or not the executive would prostitute his office by terminating a justice's assignment (because he does not approve of the results of the trials conducted in his court), the very fact that he can do so renders the above-quoted provisions of the Judiciary Law and of the State Constitution unconstitutional. Beyond the mere inclusion of the statement of that proposition in the cases cited by him, they are otherwise inapposite.

The plaintiff's argument is answered in *People v. Davis*, (67 Misc. 2d 14, 16). (There the attack was directed to the portion of section 149 of the Judiciary Law that permits the initial appointment by the Governor.) The court said:

> "Whether the legislative, executive and judicial powers of a State shall be kept together or separate is a determination to be made by the State. This separation of powers is not an element to be considered when making an inquiry as to whether or not the due process of law demanded by the Fourteenth Amendment has been respected by the State. (*Dreyer v. Illinois*, 187 U.S. 71, 84.)
>
> "The defendants misinterpret the separation of powers doctrine. The three branches of government cannot and do not operate within isolated, sealed and impregnable compartments. There is an interdependence, a process of unified and joint effort calculated and deliberately designed by the architects of our system of jurisprudence to give the Government balance and stability."

The additional fact that the plaintiff could and did attack the constitutionality and applicability of the items in question in a court other than that of the Justice presiding at the Extraordinary Term is a true indication that the Governor's role is not as all encompassing as the plaintiff claims it to be.

By way of analogy that the power to terminate reduces the status of the judiciary to a less than equal partnership with the executive branch, we have the question of the Governor's right to grant a pardon. Except in cases of treason or impeachment, he has the power to pardon, after conviction, the most hardened malefactor (Executive Law, §15). The exercise of such clemency erases the stigma of conviction branded upon a criminal defendant in a court of law. Certainly this constitutes a species of interference with the judicial process. Equally it could be argued, as here, that the statutory right to use the power in a corrupt manner, even if never so exercised, would tend to render these provisions of the Judiciary Law and of the State Constitution unconstitutional. Yet to date, no one has ever mounted a successful attack upon the Governor's prerogative.

As to the appointment of the special prosecutor (Executive Law, §63), whatever the preference expressed by the Governor, it was the Attorney-General who actually and factually did appoint him; and it is as a Special Deputy Attorney-General that he is conducting the prosecution.

We conclude, therefore, that the constitutional provision and the statutes under attack meet the test of constitutionality. However, a declaration in favor of the defendants should have been made, instead of dismissing the complaint (*Lanza v. Wagner*, 11 NY2d 317, 334).

The order appealed from should be modified, on the law, by striking therefrom the provisions granting dismissal of the complaint and by substituting therefor a provision declaring that section 27 of article VI of the New York State Constitution, section 149 of the Judiciary Law and section 63 of the Executive Law are constitutional. As so modified, the order should be affirmed, with one bill of $50 costs and disbursements jointly to respondents.

HOPKINS, Acting P.J., MARTUSCELLO, CHRIST and MUNDER, JJ., concur.

APPENDIX B
DECISION OF SUPREME COURT, KINGS COUNTY (McGROVER, J.) DISMISSING COMPLAINT

MEMORANDUM

SUPREME COURT: KINGS COUNTY (SPECIAL TERM, PART I)

WILLIAM STEINMAN

By McGROVER, J.

vs.

Dated November 25, 1974

MAURICE H. NADJARI, as Special Deputy Attorney General, JOHN M. MURTAGH, as Justice of the Extraordinary Special and Trial Term of the Supreme Court, LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, and MALCOLM WILSON, as Governor of the State of New York.

Plaintiff seeks a declaratory judgment to the effect that Article VI, section 27, of the Constitution of the State of New York and section 149 of the Judiciary Law are unconstitutional in that they violate due process and the doctrine of separation of executive and judicial powers as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 6, of the State Constitution, and that section 63 of the Executive Law, as applied, and the Governor's Executive Order dated September 19, 1972 are void and unconstitutional as violative of due process and the separation of powers doctrine.

Plaintiff requests injunctive relief, both temporary and permanent, precluding the prosecution and trial of plaintiff, based also upon allegations of prosecutorial

misconduct on the part of defendant Nadjari and bias "inherent in the unconstitutional statutes aforesaid" on the part of defendant Trial Judge Murtagh.

The motions now presented for determination are the following: Motion by defendant Nadjari to dismiss the complaint for failure to state a cause of action or, alternatively, for summary judgment; motion by the State Attorney General, pro se and on behalf of defendants Murtagh and Wilson, to dismiss the complaint for failure to state a cause of action; motion by plaintiff for summary judgment in his favor.

Plaintiff was indicted in 1973 by the Extraordinary and Special Grand Jury for the County of Kings for the crimes of conspiracy in the third degree, attempted bribery in the second degree, and grand larceny in the second degree.

On February 8, 1974 plaintiff moved before the Appellate Division, Second Department, for an order dismissing the indictment in the interests of justice because of alleged prosecutorial misconduct on the part of the defendant Nadjari and alleged bias upon the part of Mr. Justice Murtagh. As to the defendant Nadjari's abuse of authority, plaintiff made the same charges before the Appellate Division as he does in this court, namely, that he was entrapped by the prosecutor; that he was forced to entrap others; and that he was held for three months without arraignment or preliminary hearing.

In May of 1974, the Appellate Division, Second Department, denied defendant's motion to dismiss the indictment (*People v. Steinman*, 44 A D 2d 839), and in so doing, the court relied upon Mr. Justice Shapiro's concurring opinion in *Matter of Klein* (44 A D 2d 465, affd. 34 N Y 2d 988).

From the papers and briefs submitted herein, it is clear that all the issues here raised, except the question of the constitutionality of the statutes and provisions above mentioned, were before the Appellate Division, which held that those issues should be resolved first at the trial level where a full showing of all of the relevant facts could be made. Any dispositions at the trial level are, of course, subject to appellate review.

As pointed out above, plaintiff now also urges that there is a question involved as to the constitutional validity of the provisions of Article VI, section 27, of the New York State Constitution, section 149 of the Judiciary Law, and section 63 of the Executive Law. These sections read, where pertinent, as follows:

Art. 6, §27 [*EXTRAORDINARY TERMS OF THE SUPREME COURT*]

"The governor may, when in his opinion the public interest requires, appoint extraordinary terms of the supreme court. He shall designate the time and place of holding the term and the justice who shall hold the term. The governor may terminate the assignment of the justice and may name another justice in his place to hold the term."

§149. GOVERNOR MAY APPOINT EXTRAORDINARY TERMS AND NAME JUSTICES TO HOLD THEM

"1. The governor may, when, in his opinion the public interest requires, appoint one or more extraordinary special or trial terms of the supreme court. He must designate the time and place of holding the same, and name the justice who shall hold or preside at such term, and he must give notice of the appointment in such manner as, in his judgment, the public interest requires. The governor may terminate the assignment of the

justice named by him to hold a term appointed pursuant to this section, and may name another justice in his place to hold the same term."

§63. GENERAL DUTIES

The attorney-general shall:

"1. Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state ***.

2. Whenever required by the governor, attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement; in which case the attorney-general or his deputy so attending shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform; * * *."

Plaintiff contends that these provisions violate the separation of powers doctrine as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution.

All of the foregoing issues, constitutional and otherwise, may be raised in the criminal proceedings now pending against plaintiff in which an indictment had been returned against him prior to commencement of the present action. It is also clear that plaintiff could have raised the constitutional question before the Appellate Division on the motion to dismiss the indictment, but failed to do so. Plaintiff may still bring this issue before the Appellate Division on a second motion to dismiss and may, of course, raise it again on appeal. Thus, plaintiff has had and will

continue to have an adequate remedy at law. In the circumstances, the court will not enjoin the enforcement of the criminal law by prosecuting officials; and this is particularly true where, as here, the Appellate Division has already held that most of the issues should be resolved at the trial level. As stated in *Reed v. Littleton* (275 N.Y. 150) at page 153:

> "The court of equity has at times been called upon to enjoin the enforcement of a criminal prosecution. The rule has been firmly established that it will not ordinarily intervene to enjoin the enforcement of the law by the prosecuting officials (*Davis v. American Society*, 75 N.Y. 362; *Delancy v. Flood*, 183 N.Y. 323) unless under proper circumstances there would be irreparable injury, and the sole question involved is one of law (*Mills Novelty Co. v. Sunderman*, 266 N.Y. 32) where a clear legal right to the relief is established (*Triangle Mint Corp. v. Mulrooney*, 257 N.Y. 200)."

While an action for a declaratory judgment will lie where a constitutional question is involved and the facts are undisputed (*Dun & Bradstreet v. City of New York*, 276 N.Y. 198, 206; *De Veau v. Braisted*, 5 A D 2d 603, affd. 5 N Y 2d 236; *Sa-Bleu, Inc. v. Village of Port Chester*, 42 Misc 2d 360), such an action will not be entertained where, as here, a criminal proceeding is already pending, involving the criminal prosecution of plaintiff, in which the constitutional issues with respect to which a declaration of rights is sought in this action may be raised and determined and in which the right of appeal is preserved (*Colson v. Pelgram*, 259 N.Y. 370; see *Woollard v. Schaffer Stores Co.*, 272 N.Y. 304, 311; cf. *Pomaranz v. City of New York*, 1 Misc 2d 486, 489; *Sa-Bleu, Inc. v. Village of Port Chester, supra*, at p. 363). It is true that resort to an action for a declaratory judgment and also for an injunction "may

be had even with respect to penal statutes and against a public official or public agency whose duty it is to conduct appropriate prosecutions, if the purpose be to avoid irreparable injury and if the sole question is one of law [citations]" (*De Veau, supra,* at pp. 606, 607). A case involving the avoidance of irreparable injury would exist where, as in *De Veau* (*supra*), the challenged statute could be the basis of a *threatened* prosecution for crime. In such a situation interested parties should not be required, as a prerequisite to judicial entertainment of the question, that they first commit the very acts which are violative of the statute involved, and thereby run the risk of prosecution (see *De Veau, supra,* at p. 607). It is evident, however, that the present case does not come within the purview of cases such as *De Veau,* but involves, as stated above, a criminal proceeding which has already been brought charging the interested party with a violation of the law.

The court concludes that the present action does not properly lie and accordingly the defendants' respective motions to dismiss the complaint for failure to state a cause of action are granted and plaintiff's cross motion is denied.

Settle order.

s/ Albert S. McGrover
J.S.C.

APPENDIX C
ORDER OF APPELLATE DIVISION DEC. 1, 1975

At a term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 1, 1975.

HON. JAMES D. HOPKINS, *Acting Presiding Justice,*
HON. M. HENRY MARTUSCELLO
HON. JOHN P. COHALAN, JR., *Associate Justices*
HON. MARCUS G. CHRIST
HON. FRED J. MUNDER

William Steinman,
Appellant,

v.

Maurice H. Nadjari, etc., et al.,
Respondents.

Order on Appeal from Order.

In the above entitled cause, the above named William Steinman, plaintiff, having appealed to this court from an order of the Supreme Court, Kings County, dated December 23, 1974, which (1) granted defendants' motions to dismiss the complaint and (2) denied his cross motion for summary judgment; and the said appeal having been argued by Aaron Nussbaum, Esq., of counsel for the appellant, argued by Allen G. Swan, Esq., of counsel for Maurice H. Nadjari, Deputy Attorney-General, respondent *pro se* and submitted by Burton Herman, Esq., of counsel for Louis J. Lefkowitz, Attorney-General, respondent *pro*

se and for John M. Murtagh and Malcolm Wilson, respondents, due deliberation having been had thereon and upon OPINION by COHALAN, J., and this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the order appealed from is hereby modified, on the law, by striking therefrom the provisions granting dismissal of the complaint and by substituting therefor a provision declaring that section 27 of article VI of the New York State Constitution, section 149 of the Judiciar Law and section 63 of the Executive Law are constitutional; and, as so modified, the order is unanimously affirmed, with one bill of $50 costs and disbursements jointly to respondents.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division.

APPENDIX D
MEMORANDUM DECISION NEW YORK COURT OF APPEALS JUNE 10, 1976

2 Mo. No. 468

William Steinman,

Appellant,

vs.

Maurice H. Nadjari, as Special Deputy Attorney General, et al.,

Respondents.

Motion to dismiss the appeal herein granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and upon the further ground that the modification at the Appellate Division is not substantial (CPLR 5601[a][iii]).

APPENDIX E
ORDER OF NEW YORK COURT OF APPEALS, JUNE 10, 1976

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the tenth day of June A.D. 1976

PRESENT, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

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2 Mo. No. 468
William Steinman,

Appellant,

vs.

Maurice H. Nadjari, as Special Deputy Attorney General, et al.,

Respondents.

A motion having heretofore been made herein upon the part of respondents to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and upon the further ground that the modification at the Appellate Division is not substantial (CPLR 5601[a][iii]).

s/ Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

Supreme Court, U. S.
FILED
OCT 12 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-324

WILLIAM STEINMAN,

Petitioner,

against

MAURICE H. NADJARI, as Special Deputy Attorney General, JOHN M. MURTAGH, as Justice of Extraordinary Special and Trial Term of Supreme Court, LOUIS J. LEFKOWITZ, as Attorney General of State of New York, and MALCOLM WILSON, as Governor of State of New York,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department

BRIEF FOR RESPONDENT NADJARI IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

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On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department

BRIEF FOR RESPONDENT NADJARI IN OPPOSITION TO PETITION FOR CERTIORARI

Preliminary Statement

Petitioner William Steinman seeks a writ of certiorari to review the judgment rendered December 1, 1975 by the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, declaring that Article

VI, Section 27 of the New York State Constitution, section 149 of the Judiciary Law of New York and section 63 of the Executive Law of New York, are constitutional and not violative of the Fifth and Fourteenth Amendments of the Constitution of the United States.

On June 10, 1976, the New York Court of Appeals of the State of New York, by memorandum decision, dismissed the appeal taken as right, upon the ground that no substantial constitutional question is involved.

Opinions Below

The opinion of the Supreme Court of the State of New York, Second Judicial Department, is set forth in the appendix to petitioner's brief (1-6a).

. The memorandum decision of the New York Court of Appeals is set forth in the appendix to petitioner's brief (15a).

Jurisdiction

The jurisdiction of this Court is invoked under 28 USC §1257(2).

Question Presented

Whether Art. VI Section 27 of the New York Constitution, section 149 of the Judiciary Law of the State of New York and section 63 of the Executive Law of the State of New York are unconstitutional.

Statutes Involved

The statutes involved are Art. 6, Section 27 of the New York Constitution, section 149 of the Judiciary Law and section 63 of the Executive Law of the State of New York, and are set forth at pages 2-4 of petitioner's brief.

Statement of the Case

Petitioner, by a complaint dated September 10, 1974, brought an action for declaratory judgment and permanent injunction in Supreme Court, Kings County, against then Special State Prosecutor Maurice H. Nadjari, then Justice John M. Murtagh, Attorney General Louis J. Lefkowitz and then Governor Malcolm Wilson. Specifically, the complaint alleged that Article VI, Section 27, of the New York State Constitution, section 149 of the Judiciary Law, section 63 of the Executive Law, and Executive Order Number 58 are unconstitutional and that the Special Prosecutor had engaged in various acts of misconduct. The complaint sought a judgment declaring the cited provisions unconstitutional and enjoining the prosecution.

The Special Prosecutor moved to dismiss the complaint on the ground that the complaint failed to state a cause of action. The other defendants joined in the motion, and Steinman cross-moved for summary judgment. In an additional affidavit, Steinman alleged that he was irreparably injured in facing the monetary expenses of his federal civil rights action he had previously instituted, criminal trial and appeals.

By a memorandum dated November 25, 1974, the Supreme Court, Kings County (McGrover, J.), granted the defendants' motions to dismiss, holding that a declaratory judgment action "will not be entertained where, as here, a criminal proceeding is already pending, involving the criminal prosecution of plaintiff, in which the constitutional issues with respect to which a declaration of rights is sought in this action may be raised and determined and in which the right of appeal is preserved." On December 23, 1974, judgment was entered dismissing the complaint.

Steinman thereafter sought to appeal from this decision directly to the Court of Appeals, pursuant to CPLR 5601(b)(2). On February 14, 1975, the Court of Appeals dismissed the appeal *sua sponte* "on the ground that the constitutionality of a statute under the State or Federal Constitutions is not the only question involved on the appeal." *Steinman* v. *Nadjari*, 36 N.Y. 2d 684 (1975). On March 20, 1975, the Court of Appeals denied Steinman's application for an order vacating the dismissal of his appeal. *Steinman* v. *Nadjari*, 36 N.Y. 2d 758 (1975).

On December 1, 1975, the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, modified the decision of the lower court, and held that Art. 6 Sec. 27 New York State Constitution, Section 149 Judiciary Law and Section 63 Executive Law are constitutional (1-6a).

On June 10, 1976, on Petitioner's appeal taken as right therefrom, to the New York Court of Appeals on constitutional grounds pursuant to Civil Practice Law and Rules 5601(a), the Court dismissed the appeal upon the ground

that "no substantial constitutional question is directly involved * * *" (15a).

Subsequent thereto, the Petitioner pleaded guilty to one count of the indictment, Grand Larceny Second Degree, and on March 19, 1976 was sentenced to pay a fine of $2,000. A Certificate of Relief from Disabilities was issued to Petitioner on April 19, 1976, pursuant to Article 23, N.Y. Correction Law.

No appeal from this conviction and judgment has been filed.

POINT I

The State constitutional and statutory enactments providing for the superseder of a district attorney by the Attorney General and the appointment of an extraordinary special and trial term of the Supreme Court are constitutional.

Petitioner is again asserting his claims that Article VI, Section 27, of the New York State Constitution, section 149 of the Judiciary Law, section 63 of the Executive Law and Executive Order Number 58 are unconstitutional.

Petitioner's first attack is directed at Article VI, Section 27, of the New York State Constitution and its implementing statute, section 149, subdivision 1, of the Judiciary Law, both of which provide that the Governor may, when "the public interest requires," appoint one or more extraordinary special and trial terms of the Supreme Court and may name "the justice who shall hold the term"; further, the Governor "may terminate the assignment of the justice

and may name another justice in his place to hold the term." By this procedure, the Governor, as he did at the same time in the other four counties of New York City, established the Extraordinary Special and Trial Term of the Supreme Court, Kings County, for the trial of cases brought by the Special Prosecutor, and named Mr. Justice JOHN M. MURTAGH to preside at the term. Exec. Order No. 64, 9 NYCRR 1.64. Steinman claims that this procedure allows the Governor to appoint and remove a judge at will and thus violates the separation of powers doctrine of the United States Constitution and the independence of the judiciary. He is wrong.

First, as Petitioner concedes, this Court was faced with precisely the same argument in *Matter of Moritt* v. *Extraordinary Special and Trial Term of Supreme Ct., Kings County*, 46 A.D. 2d 1012 (2d Dept. 1974), *appeal dismissed*, 36 N.Y.2d 911 (1975), *leave to appeal denied*, 37 N.Y.2d 707 (1975), *appeal dismissed*, — U.S. —, 96 S.Ct. 557 (1975). There, in a proceeding brought pursuant to article 78 of the Civil Practice Law and Rules to prohibit Moritt's prosecution, *inter alia*, for the alleged unconstitutionality of the extraordinary term procedure, this Court dismissed the petition "on the merits." In addition, the federal courts in *United States ex rel. Monty* v. *McQuillan*, 385 F. Supp. 1308 (E.D.N.Y. 1974), *aff'd* Docket No. 75-2012 (2d Cir. May 1, 1975), have rejected a similar challenge to the procedure. Specifically, Judge JUDD noted that the procedure does not violate due process standards, for a defendant has no right to a judge of his own choosing or even to a certain method of selecting a judge, as long as the judge is fair and impartial. *Id.* at 1310; *see United States* v. *Keane*, 375 F.

Supp. 1201, 1204 (N.D. Ill. 1974). The court further observed in a statement most appropriate to the case at bar:

> "No substantial charge of actual bias is made against Mr. Justice Murtagh. The general rule is that questions whether it would be improper to sit in a particular case are 'a matter confided to the conscience of the particular judge.' Weiss v. Hunna, 312 F. 2d 711, 714 (2d Cir. 1963), cert. denied, 374 U.S. 853, 83 S.Ct. 1920, 10 L.Ed. 2d 1073, rehearing denied, 375 U.S. 874, 84 S.Ct. 37, 11 L.Ed.2d 104 quoting MacNeil Bros. Co. v. Cohen, 264 F. 2d 186, 189 (1st Cir. 1959). Bias can be charged in any event only on a showing that it stems from an extrajudicial source and results 'in an opinion on the merits on some basis other than what the judge learned from his participation in the case.' United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed. 2d 778 (1966)." *United States ex rel. Monty* v. *McQuillan, supra* at 1311.

The *Monty* case thus vitiates Petitioner's claim that the establishment of an extraordinary term infringes upon the independence of the judiciary in violation of due process. Petitioner fails to rebut the logic of that decision. Moreover, he has in no way shown or even hinted that the Governor who appointed this Extraordinary Term or the many governors who in the past have established similar terms have done so with any purpose other than that prescribed by the statute, *i.e.*, when the public interest requires such action. Indeed, for the Governor to "appoint a judge to do his bidding," as Petitioner fears, would be a "violation of [the] law" under attack. *People* v. *Davis*, 67 Misc. 2d 14, 16 (Sup. Ct., Extraordinary Special and Trial Term, Ontario Co. 1971).

The additional power of the Governor to terminate the assignment and name another justice to hold the term is one of necessity, occasioned by the possibility that a presently assigned justice may become unable or unwilling to continue his position. The Governor has no judicial function or influence in the proceedings. Aside from the power to assign and remove the justice, the Governor "has no power to do more," and he "has not attempted to do more." *Saranac Land and Timber Co.* v. *Supreme Court*, 220 N.Y. 487, 492 (1917). Indeed, he has not yet even removed or replaced any justice assigned to this Extraordinary Term. Ironically, the power which Petitioner complains of most, the power of removing a judge, has not only not been used by the Governor, but Petitioner himself attempted to have it invoked, albeit improperly, in his earlier motion before the Supreme Court, State of New York, Second Judicial Department. *See People* v. *Steinman*, 44 A.D. 2d 839 (2d Dept. 1974). Having already attempted to utilize Article VI, Section 27, of the State Constitution in his favor, it is puzzling that he is now asserting its invalidity.

In short, an extraordinary term is "to be conducted in accordance with the rules of law governing all the other terms of court with the exception of the designation of the judge." *Matter of Reynolds* v. *Cropsey*, 241 N.Y. 389, 395 (1925). The procedure in no way creates a tribunal with a built in personal or pecuniary interest in the outcome of a trial. *Cf. Gibson* v. *Berryhill*, 411 U.S. 564 (1973); *In re Murchison*, 349 U.S. 133 (1955); *Tumney* v. *State of Ohio*, 273 U.S. 510 (1927). Indeed, if the trial judge is unbiased, or if no prejudice is shown, Petitioner would have no reason to complain. *United States ex rel. Monty* v. *McQuillan*, *supra* at 1311; *see Matter of Shakur* v. *Murtagh*, 33 A.D. 2d 901 (1st Dept. 1970), *leave to appeal denied and appeal dismissed*, 27 N.Y. 2d 483, 670 (1970), *cert. denied*, 400 U.S. 948 (1970). And if the judge is biased against Petitioner, the latter has an adequate remedy in the trial court for seeking the judge's disqualification. Judiciary Law §14; 22 NYCRR 33.3(c) (Judicial Conference).

As to Petitioner's additional argument that an extraordinary term violates the federal separation of powers doctrine, the United States Constitution contains no requirement that the structure of state governments conform exactly to the structure of the national government. The federal separation of powers doctrine does not apply to the states:

> "Whether the legislative, executive and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in some respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is *for the determination of the state*. And its determination one way or the other cannot be an element in the inquiry, whether the due process of law prescribed by the 14th Amendment has been respected by the state or its representatives when dealing with matters involving life or liberty." *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902) (emphasis supplied).

Cf. United States v. *Brown*, 381 U.S. 437, 442-43 (1965). In truth, all that the Constitution requires of each state is a "Republican Form of Government" [U.S. Const. art. IV, §4], the existence of which here is demonstrated by the fact that the People of the State of New York themselves

voted to adopt the very State constitutional provision under attack. *See* N.Y. Const. art. XIX, §1.

Petitioner's next challenge is to section 149, subdivision 2, of the Judiciary Law, which provides that the Appellate Division, in its discretion, may hear a motion addressed to an extraordinary term. The existence of such discretion, Petitioner argues, diminishes the rights of all litigants before an extraordinary term and thereby denies them equal protection of the law. The same claim was rejected by this Court in *Matter of Moritt* v. *Extraordinary Special and Trial Term of Supreme Ct., Kings County, supra.*

Moreover, the use of sound judicial discretion is not uncommon to either the state or federal courts, as it is employed in decisions on bail, sentence or granting certiorari or leave to appeal. In the same manner, the Appellate Division has discretion to hear a motion before an extraordinary term if the defendant shows a clear need for such action. *Cf.* Criminal Procedure Law §255.20(2). On the other hand, discretion not to hear a motion is often necessary because an appellate court may not have the facilities to pass upon such a motion, especially if an evidentiary hearing is required. *See* Criminal Procedure Law §210.45(6). This was the case with the motion brought by Steinman earlier in the Second Department on a motion to dismiss the indictment, which involved sharply disputed questions of fact. *See People* v. *Steinman, supra.* In any event, the same matters brought before an extraordinary term on a motion may be raised in due course on the judgment appeal in the same Appellate Division which earlier had declined to hear the motion.

Finally, there is no showing that any court in the State of New York, either in Petitioner's or other cases, have practiced invidious discrimination or unreasonable distinctions in deciding whether to entertain a pre-trial motion. *Cf. Williams* v. *Oklahoma City*, 395 U.S. 458 (1969); *Baxstrom* v. *Herold*, 383 U.S. 107 (1966); *Griffin* v. *People of the State of Illinois*, 351 U.S. 12 (1956). The claim is thus without merit.

Petitioner's final constitutional challenge is to section 63, subdivision 2, of the Executive Law, by which the Governor may request the Attorney General or his deputy (in this case, the Special State Prosecutor, pursuant to Executive Order Number 58, 9 NYCRR 1.58, also challenged by Petitioner) to supersede a local district attorney and prosecute a certain case or class of cases. While it is difficult to ascertain the exact basis for the challenge, it appears to be that this provision is invalid because the Special Prosecutor has abused his authority.

This constitutional claim was likewise rejected by this Court in *Matter of Moritt* v. *Extraordinary Special and Trial Term of Supreme Ct., Kings County, supra.* Moreover, the claim is not even an attack upon the statute, but is rather a factual accusation of prosecutorial misconduct. As such, it does not present a constitutional question. Further, the legality of the Attorney General's superseder power is no longer in doubt, as it has been upheld by the courts of the State of New York over the decades. *See, e.g., Matter of DiBrizzi*, 303 N.Y. 206 (1951); *Matter of Turecamo Contracting Co., Inc.*, 260 App. Div. 253 (2d Dept. 1940); Pitler, *Superseding the District Attorneys in New York City—The Constitutionality and Legality of Executive Order No. 55*, 41 Ford. L. Rev. 517 (1973).

In sum, Petitioner's claims are meritless. Had Petitioner not been properly precluded from bringing a declaratory judgment action to bar his pending prosecution, judgment should correctly have been rendered declaring the challenged provisions constitutional.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

This Reply Brief is respectfully submitted in response to the Brief for Respondent Nadjari in opposition to the Petition for Certiorari.

The Respondent makes the following glaring misstatements to this Honorable Court:

1. That in *Matter of Moritt v. Extraordinary Special and Trial Term of Supreme Ct.*, ——US——, 96 S.Ct. 557, "this Court dismissed the petition 'on the merits' " (Resp. Br. p. 6). This statement is incorrect. The Court dismissed the *Moritt petition* "solely for lack of jurisdiction."

2. That the cases of *United States ex rel. Monty v. McQuillan*, 385 F. Supp. 1308 (EDNY 1974), affd. by the Second Circuit May 1, 1975; *People v. Davis*, 67 Misc. 2d 14; *Matter of Reynolds v. Cropsey*, 241 NY 389 (1925) and *Saranac Land and Timber Co. v. Supreme Court*, 220 NY 487 have all previously resolved the constitutional issues herein adversely to the Petitioner's contentions. (Resp. Br. pp. 6-8)

We respectfully submit in reply, however, that each of these cases construed the statute in its *pre-amended* form. None of these cases dealt with fundamental question of separation of powers presented by the amendment thereto as follows: "*The Governor may terminate the assignment of the Justice and may name another Justice in his place to hold the same term.*"

3. That "Petitioner's next challenge is to section 149 subdivision 2 of the Judiciary Law, which provides that the Appellate Division, in its discretion, may hear a motion addressed to an extraordinary term." (Resp. Br. p. 10)

In answer, we respectfully submit that the Petitioner has not in any way asserted the latter issue in the Petition for Certiorari before this Court.

4. That "the additional power of the Governor to terminate the assignment and name another justice to hold the term is one of necessity, occasioned by the possibility that a presently assigned justice may become unable or unwilling to continue his position." (Resp. Br. p. 8).

In reply, we respectfully submit that the absolute power vested in the Governor to terminate the assignment of the Justice and replace him with another, is not duplicated in any other statute pertaining to judicial office. The autocratic power to place and replace the judge at will is not at all grounded upon reasons of necessity pertaining to illness or incapacity, in view of the fact that New York's Judiciary Law, applicable to all other judges, amply covers

such contingencies through the powers of administrative judicial supervision. (*Judiciary Law, Article 7-A*).

In *haec verba*, the statute here in issue imposes no limits or restraints whatever, and unconstitutionally delegates to the Governor complete control over his appointee as presiding justice of the Extraordinary Special and Trial Term of the Supreme Court.

The evil potentials of such a statute might be well viewed in the context of the historical Watergate prosecutions, where the President summarily fired the Attorney General from his quasi-judicial office in order to deter further inquiry. *Ipso facto*, if the Congress had created a statute identical as at bar, giving the President the absolute power to remove Federal Judge Sirica as presiding judge "and name another justice in his place to hold the same term", is it not conceivable that at the very least, the mere *potential* of removal might not have had a stultifying effect upon the independence of the judiciary? And in view of the actual "Saturday Night Massacre" of the quasi-judicial Attorney General which did occur, is it not conceivable too that the President might not have followed suit under such a statute to remove and replace Judge Sirica with another Judge more attuned to the aims of the Executive? In sum, it is in the *potential* of the statute in issue, not in what actually occurs under it, that renders it offensive to the doctrine of separation of powers under the Fifth and Fourteenth Amendments of the Constitution of the United States.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: October 14, 1976

Respectfully submitted,

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